

January 19, 2006

To: Energy and Telecommunications Interim Committee

From: Mary Wright, Attorney
Montana Consumer Counsel

Subject: Preliminary Comments on LC 4144

The Montana Consumer Counsel (MCC) respectfully presents these preliminary comments on LC 4144. We understand that before the Committee takes any action on this draft legislation, interested parties will have an opportunity to provide more formal comments. MCC presents these preliminary comments to the Committee members at this time for the members' information.

MCC supports the development of competition in telecommunications markets, and has taken many actions in support of the development of competition. MCC also supports Montana's statutory approach to gradual deregulation of telecommunications as competition develops. Any premature deregulation, however, carries great risk to customers, businesses, and even providers themselves, as we learned when wholesale electric markets were deregulated before competition had developed.

The primary basis for the draft legislation as presented to the Committee by Qwest is the emergence of competition in some portions of the Montana local telecommunications market, and Qwest's need for this legislation to meet that competition. MCC questions whether there is sufficient competition in the markets affected by this draft legislation for it to provide adequate protection for consumers in the place of regulation for the following reasons:

1. The presence of competitors in the market does not equate to competitive markets robust enough to protect consumers. The latest statistics available from the Federal Communications Commission (FCC) show that in Montana, only 4 percent of

land lines are served by Competitive Local Exchange Carriers, as opposed to the Incumbent Local Exchange Carriers (ILECs) such as Qwest.

2. MCC does not dispute that there is competition for Qwest and other ILECs from cellular and other technologies. There is some evidence, however, that customers who subscribe to cellular service also generally keep their landline service as a complementary, and not a substitute, service. The fact is that no one knows the state of local competition in Montana. MCC has asked the Public Service Commission to open a proceeding to investigate this issue. Before departing from the current statutory framework, which provides for gradual and targeted deregulation as actual market conditions permit, the Commission should conduct this investigation so that Montana proceeds on a rational and fact-based course.

3. Qwest has stated that it needs the ability to conduct unfettered promotions without prior notice or approval to meet competition. Qwest largely has the ability to conduct promotions today with little process, and MCC has supported that ability. It has a number of tools available to it without changing the law, however. It could ask the Commission for a protective order so that it could unveil promotions without prior notice to competitors. In addition, current law provides that Qwest could seek an alternate form of regulation that would give it flexibility to meet competition if needed to retain market share, but it has chosen not to do that.

4. Qwest claims that it is losing market share to competitors. Yet according to its most recent annual report, it is earning over 47 percent on equity, while its lawful, authorized rate of return is 12 percent. This level of earnings alone calls into question whether the market is competitive. If Qwest is interested in fending off competition, it should lower its rates to all customers, not just those that it chooses to include in promotions that it selects. In an effort to investigate Qwest's over-earning at the expense of its Montana customers, the Commission opened a case and asked Qwest for information regarding its earnings. Rather than supply that information, Qwest

challenged the Commission in court. The case is now pending before the Montana Supreme Court.

5. Qwest has represented to this Committee that three years ago, the FCC declared the Montana local exchange market competitive. For the Committee's information, that FCC proceeding (the "section 271 proceeding") looked not at the market, but whether Qwest had sufficiently opened its network to competitors, as required by federal law, to earn the right to provide long distance service within its 14-state service area, including Montana. MCC supported Qwest in its 271 application. The FCC has not, nor has any other authority, declared local service in Montana competitive.

MCC will provide more detailed comments at the appropriate time. If any member would like more information, please feel free to call us.